(4)

A - 695
No. 96-8400

Supreme Court, U.S.
FILED
APR 1997
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

DOUGLAS McARTHUR BUCHANAN,

Petitioner

v.

RONALD J. ANGELONE, DIRECTOR, et al.

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND TO APPLICATION FOR STAY OF EXECUTION

JAMES S. GILMORE, III
Attorney General of Virginia

***KATHERINE P. BALDWIN**
Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

***Counsel of Record**

26 pp

QUESTIONS PRESENTED

In a case where the petitioner concedes that he slayed his entire family, including his father, step-mother and two juvenile siblings, should this Court stay the execution and grant certiorari to review:

1. A claim that Virginia is required to give the jury a list of "mitigating" factors even though it long has been established that Virginia's sentencing instruction to "consider all of the evidence," coupled with its verdict form affirming that the jury in fact considered the evidence in mitigation, satisfies the Eighth Amendment?

2. A routine evidentiary claim that the petitioner was entitled to present hearsay statements made to his sentencing-phase mental health expert during interviews conducted by the expert in preparation for his trial testimony?

TABLE OF CONTENTS

PAGE

INTRODUCTION 1

STATEMENT OF THE CASE 1

A. The Crimes 1

B. The Proceedings 3

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY 4

I. THE STATE AND FEDERAL COURTS PROPERLY AND REPEATEDLY HAVE REJECTED BUCHANAN'S EIGHTH AMENDMENT CHALLENGE TO VIRGINIA'S SENTENCING INSTRUCTION 5

II. BUCHANAN'S DUE PROCESS CHALLENGE TO THE SENTENCING INSTRUCTION STATES NO FEDERAL QUESTION 9

III. BUCHANAN'S HEARSAY CLAIM STATES NO FEDERAL QUESTION 10

CONCLUSION 12

RESPONDENTS' APPENDIX:

Excerpt, sentencing transcript 4/30/88 . . . . . RESP. APP. 1

Va. Code § 19.2-264.4 . . . . . RESP. APP. 4

TABLE OF AUTHORITIES

PAGE

CASES

Barefoot v. Estelle,
463 U.S. 880 (1983) 4

Boyde v. California,
494 U.S. 370 (1990) 7, 8

Briley v. Bass,
750 F.2d 1238 (4th Cir. 1984),
cert. denied, 470 U.S. 1088 (1985) 5

Buchanan v. Commonwealth,
238 Va. 389, 384 S.E.2d 757 (1989) 1, 3, 5, 10, 12

Buchanan v. Murray,
506 U.S. 988 (1992) 4

Buchanan v. Netherland,
103 F.3d 344 (4th Cir. 1996) 4, 5, 7, 10, 12

Buchanan v. Virginia,
493 U.S. 1063 (1990) 3

Caspari v. Bohlen,
510 U.S. 383 (1993) 9, 12

Chenault v. Stynchcombe,
581 F.2d 444 (5th Cir. 1978) 8

Clanton v. Muncy,
845 F.2d 1238 (4th Cir.),
cert. denied, 485 U.S. 1000 (1988) 5

Clark v. Commonwealth,
220 Va. 201, 257 S.E.2d 784 (1979),
cert. denied, 444 U.S. 1049 (1980) 5

Clozza v. Murray,
913 F.2d 1092 (4th Cir. 1990),
cert. denied, 499 U.S. 913 (1991) 5

Cunningham v. Zant,
928 F.2d 1006 (11th Cir. 1991) 8

Delo v. Blair,
509 U.S. 823 (1993) 4

Eddings v. Oklahoma,
455 U.S. 104 (1982) 5, 7

Estelle v. McGuire,
502 U.S. 62 (1991) 9, 12

Green v. Georgia,
442 U.S. 95 (1979) 10, 11

Hicks v. Oklahoma,
447 U.S. 343 (1980) 9, 10

Hines v. Commonwealth,
136 Va. 728, 117 S.E. 834 (1923) 11

Johnson v. Texas,
509 U.S. 350, 113 S.Ct. 2658 (1993) 7

Jones v. Murray,
947 F.2d 1106 (4th Cir. 1991),
cert. denied, 503 U.S. 973 (1992) 7

LeVasseur v. Commonwealth,
225 Va. 564, 304 S.E.2d 644 (1983) 9

Lockett v. Ohio,
438 U.S. 586 (1978) 5, 7

Netherland v. Tuggle,
116 S.Ct. 4 (1995) 4

Penry v. Lynaugh,
492 U.S. 302 (1989) 5, 7

Romano v. Oklahoma,
512 U.S. 1, 114 S.Ct. 2004 (1994) 12

Smith v. Commonwealth,
219 Va. 455, 248 S.E.2d 135 (1978),
cert. denied, 441 U.S. 967 (1979) 8

Spivey v. Zant,
661 F.2d 464 (5th Cir. 1981) 8

Tuggle v. Netherland,
79 F.3d 1386 (4th Cir.),
cert. denied, 117 S.Ct. 237 (1996) 7

Tuggle v. Netherland,
116 S.Ct. 283 (1995) 7

Watkins v. Commonwealth,
229 Va. 469, 331 S.E.2d 422 (1986) 5

Zant v. Stephens,
462 U.S. 862 (1983) 7, 8

OTHER AUTHORITIES

Title 28, § 2254, United States Code 4

Title 28, § 2254 (d), United States Code 9, 10, 12

Code of Virginia:

§ 17-110.2 3

§ 19.2-264.5 3

§ 17-110.2 3

§ 18.2-31(7) 3

§ 19.2-264.4 . . . . . 9, 10

§ 19.2-264.5 3

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

INTRODUCTION

Douglas Buchanan's execution is scheduled for April 8, 1997, at 9:00 p.m. On December 30, 1996, a panel of the United States Court of Appeals for the Fourth Circuit unanimously affirmed the district court's denial of Buchanan's petition for a writ of habeas corpus and the entire Fourth Circuit denied rehearing on January 27, 1997. Buchanan fails to meet the standard for the granting of a stay of execution and fails to present any compelling reason why this Court should review his case.

STATEMENT OF THE CASE

A. The Crimes[1]

> The murders occurred in a two-hour time period between 3:30 p.m. and 5:30 p.m. on September 15, 1987. On that date, Buchanan and his wife, Christianne, drove to a spot on the Blue Ridge Parkway which was a ten-minute walk through the woods to Buchanan, Sr.'s home. They discussed the contemplated murders. Indeed, they had discussed the murders the previous day and had driven to Buchanan, Sr.'s home, but defendant decided, at that time, that he could not follow through with the plan to kill his family. On September 15, however, Buchanan left his wife, in their parked vehicle and, carrying a pair of rubber gloves and his .22-caliber rifle, walked through the woods to his father's house.

---

[1] The statement of facts of the crimes is taken verbatim from the Virginia Supreme Court's opinion. See Buchanan v. Commonwealth, 238 Va. 389, 394-396, 384 S.E.2d 757, 760-761 (1989).

Buchanan found his father outdoors behind the house. He explained having the rifle by telling his father that he had been squirrel hunting. The two went inside where they engaged in conversation. They had a disagreement because Buchanan, Sr. made disparaging remarks about his first wife, defendant's deceased natural mother. Buchanan, Sr. charged that his present wife was unfaithful and that defendant's mother had been no better. Buchanan disputed the assertions about his mother. Buchanan, Sr. broke off the conversation and invited Buchanan outside to look at a recently purchased automobile. As Buchanan, Sr. walked towards the door, Buchanan placed the rifle to the back of his head and shot him. Buchanan, Sr. fell to the floor. Buchanan then placed the rifle to his father's forehead and shot him between the eyes. Next, Buchanan dragged his father's body into the master bedroom. He reached under his father's mattress and removed a .22-caliber pistol.

Fifteen minutes later, Buchanan heard his brothers arriving from school. He stood waiting behind the living room door, rifle in hand. Donnie, who was ten years old, came in first and walked past Buchanan who shot him in the back of the head. Buchanan then placed the rifle to Donnie's face and shot him near the right temple.

J.J., who was thirteen years old, heard the shots and started to run. Buchanan went outside to the porch and shot J.J. twice as he ran. He then helped J.J. walk inside the house where he shot him a third time, this time in the left side of the forehead. Buchanan dragged the bodies of both boys from the living room. J.J., however, despite his wounds, got up and walked back into the living room. Buchanan obtained a knife from the kitchen and stabbed J.J. five times. One stab wound pierced the skull and superficially penetrated the brain; another wound severed the carotid artery.

Buchanan waited inside the house until Mrs. Buchanan returned home. As she entered the house, he hid behind the front door. Once she was inside, he confronted her with the pistol aimed at her head. He pulled the trigger once, but the pistol did not fire. On his second attempt, the pistol fired; the bullet grazed the side of Mrs. Buchanan's head; she fell to her knees. He then took the knife he had used to kill J.J. and stabbed Mrs. Buchanan repeatedly. He stabbed her four times in her upper right chest. He slashed her throat from side to side, down to her vertebra

column, severing the windpipe and all major veins and arteries in her neck. She also sustained defensive wounds to her hands.

Buchanan ran from the house through the woods to his parked vehicle. Along the way, he tossed his bloody tennis shoes and the knife into a dumpster. As his wife drove him away, he tossed the rifle out of the window.

B. The Proceedings

Buchanan was convicted by a jury in the Circuit Court of Amherst County, Virginia, of capital murder for the premeditated killing of his father, stepmother, and two step-brothers in a single transaction. Va. Code § 18.2-31(7). The jury also convicted him of the first-degree murders of each victim and of the use of a firearm in the commission of each felony. The jury fixed his punishment for the non-capital offenses at four life sentences plus fourteen years.

After a separate sentencing hearing, the jury fixed his sentence for the capital murder at death. Then, after the third sentencing proceeding required by Virginia Code § 19.2-264.5, the trial court imposed the sentences which had been fixed by the jury. Final judgment was entered on August 19, 1988.

The Virginia Supreme Court consolidated Buchanan's appeal of his capital and non-capital convictions and, after giving them priority review, see Virginia Code § 17-110.2, affirmed the capital murder conviction and death sentence, the firearms convictions and three of the four first-degree murder convictions and sentences in a unanimous opinion. See Buchanan v. Commonwealth, 238 Va. 389, 384 S.E.2d 757 (1989). Buchanan's petition for a writ of certiorari was denied by this Court. Buchanan v. Virginia, 493 U.S. 1063 (1990).

Buchanan then filed a petition for a writ of habeas corpus in the Amherst Circuit Court and, after an evidentiary hearing, denied the claims and dismissed the petition on December 19,

1991. Buchanan appealed to the Virginia Supreme Court and, on June 25, 1992, that Court refused the petition for appeal. Buchanan's subsequent petition for a writ of certiorari was denied by this Court. Buchanan v. Murray, 506 U.S. 988 (1992).

Buchanan then filed on April 15, 1993, a petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Virginia. The district court dismissed the petition on January 25, 1996, and denied reconsideration on April 8, 1996. The district court's judgment was affirmed by the Fourth Circuit on December 30, 1996. Buchanan v. Netherland, 103 F.3d 344 (4th Cir. 1996). His petition for rehearing and suggestion for rehearing in banc was denied on January 27, 1997, with no member of the court requesting a poll on the suggestion for in banc review.

On March 27, 1997, Buchanan filed this petition for a writ of certiorari along with an application for a stay of execution. He also filed in the Fourth Circuit motions to recall that court's mandate and to stay his execution. Those motions are pending in the court below.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY

This is a straightforward case in which the Fourth Circuit affirmed the denial of federal habeas corpus relief. The court's unanimous opinion is a routine application of settled principles of law to Buchanan's claims. Buchanan's certiorari petition presents no compelling reason for this Court to exercise its jurisdiction to review the decision of the Fourth Circuit. It also presents no "substantial grounds upon which relief might be granted." See Netherland v. Tuggle, 116 S.Ct. 4 (1995), citing Barefoot v. Estelle, 463 U.S. 880, 895 (1983). Buchanan, therefore, is not entitled to a stay of execution. See Delo v. Blair, 509 U.S. 823 (1993).

I. THE STATE AND FEDERAL COURTS PROPERLY AND REPEATEDLY HAVE REJECTED BUCHANAN'S EIGHTH AMENDMENT CHALLENGE TO VIRGINIA'S SENTENCING INSTRUCTION.

Buchanan argues under Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Penry v. Lynaugh, 492 U.S. 302 (1989), that the trial court was required to give the jury specific instructions directing them to consider his age, lack of prior criminal history, and emotional disturbance as facts which allegedly mitigated against imposition of the death penalty. Buchanan's challenge is not new. It has been rejected consistently by the Virginia Supreme Court and the Fourth Circuit. See, e.g., Watkins v. Commonwealth, 229 Va. 469, 491, 331 S.E.2d 422, 438 (1986), cert. denied, 475 U.S. 1099 (1986); Clark v. Commonwealth, 220 Va. 201, 212, 257 S.E.2d 784, 790 (1979), cert. denied, 444 U.S. 1049 (1980); Buchanan, 238 Va. at 416-417, 384 S.E.2d at 773; Clozza v. Murray, 913 F.2d 1092, 1105 (4th Cir. 1990), cert. denied, 499 U.S. 913 (1991); Clanton v. Muncy, 845 F.2d 1238, 1242 (4th Cir.), cert. denied, 485 U.S. 1000 (1988); Briley v. Bass, 750 F.2d 1238, 1244 (4th Cir. 1984), cert. denied, 470 U.S. 1088 (1985); Buchanan, 103 F.3d at 347-348.

The reason why Buchanan's claim states no Eighth Amendment violation and why the courts uniformly have rejected it lies in the fact that the sentencing instruction and verdict form utilized in every Virginia death penalty case, including Buchanan's, allow defendants to present, without limit, any mitigating evidence ***and at the same time*** fully allow for the jury's consideration of all the evidence. The instruction and verdict form used in Buchanan's case provided as follows:

Instruction No. 1-P

You have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph,then you ***may*** fix the punishment of the Defendant at death ***or if you believe from all the evidence*** that the death penalty is not justified, then you ***shall*** fix the punishment of the Defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the Defendant at life imprisonment. [Emphasis added].

Verdict Of Jury

We, the jury, on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them, ***and having considered the evidence in mitigation*** of the offense, we unanimously fix his punishment at death. [Emphasis added].

As the instruction clearly shows, jurors in Virginia are instructed to consider ***all*** the evidence and given the option to impose a life sentence even if they find the existence of an aggravating factor. And, as the verdict form clearly shows, the jurors certified that they in fact had considered the evidence in mitigation of the death penalty. See Buchanan, 103 F.3d at 348; Jones v. Murray, 947 F.2d 1106, 1120 (4th Cir. 1991), cert. denied, 503 U.S. 973 (1992). Indeed, as the Fourth Circuit correctly observed, States are not required under the Eighth Amendment "to adopt specific standards for instructing juries on aggravating and mitigating circumstances." Buchanan, 103 F.3d at 347, citing Zant v. Stephens, 462 U.S. 862, 890 (1983).[2] Moreover, the same sentencing instruction used in Buchanan -- to "consider all of the evidence" -- expressly was upheld in Boyde v. California, 494 U.S. 370, 383-384 (1990), against the same Eighth Amendment challenge Buchanan makes. See also Johnson v. Texas, 509 U.S. 350, 113 S.Ct. 2658, 2671-2672 (1993) (Constitution permits the States "to structure the consideration of mitigating evidence").

Unlike the errors in Lockett and Eddings, the Virginia system always has allowed, as it did in Buchanan's case, for the complete presentation of mitigating evidence during the sentencing phase of a capital murder trial. And unlike the error in Penry, Virginia's system does not depend upon narrowly-defined findings like the Texas "special issues" system that can

---

[2] Contrary to Buchanan's assertion (Pet. at 16-17), the Fourth Circuit is not "continuing" to "misapply" Zant v. Stephens. The error in Tuggle v. Netherland, 116 S.Ct. 283 (1995), was the court of appeals' reliance on Zant to automatically affirm a death sentence on the basis that evidentiary error only invalidated one of two aggravating factors. Tuggle was remanded for a harmless error review, reaffirmed by the Fourth Circuit, see Tuggle v. Netherland, 79 F.3d 1386 (4th Cir.), cert. denied, 117 S.Ct. 237 (1996), and Tuggle was executed on December 12, 1996. Buchanan's case contains no such error and the holding in Zant that the Fourth Circuit relied upon in Buchanan does not involve in any way the error that was committed in Tuggle.

leave the jury without a mechanism by which it can consider some mitigating evidence. Due to Virginia's broad allowance of evidence and its express instruction to the jury that it may impose a life sentence ***even when an aggravating factor is found and no mitigating factor is found***, see Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967 (1979), Virginia's sentencing scheme is immune from the constitutional error of which Buchanan seeks to take advantage. In the context of a sentencing proceeding where Buchanan had been permitted to present to the jury extensive evidence about his character and background, and had been permitted to argue that such evidence warranted a life sentence rather than the death penalty,[3] the Constitution clearly did not require that instructions provide any further explanation of the concept of mitigation, much less that particular evidence must be considered as mitigating.

Finally, the Virginia Supreme Court's rejection of Buchanan's claim on direct appeal was neither contrary to, nor an unreasonable application of, this Court's clearly established precedent. See Zant v. Stephens, 464 U.S. at 890; Boyde v. California, 494 U.S. at 383-384.[4]

---

[3] Buchanan not only presented extensive testimony concerning mitigating factors, but counsel argued it extensively to the jury at the penalty phase. Counsel told the jury in closing argument that mitigation is "a way to weigh all the facts of a man's background...." and that "practically any factor can be considered in mitigation." (Resp. App. 2-3, attached to this brief).

[4] Buchanan's reliance on Fifth and Eleventh Circuit cases does not demonstrate a split of authority. Two of the three cases he relies on, Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978), and Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), were decided before Zant v. Stephens made clear in 1983 that States are not required to give particular jury instructions. And the holding in Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991), simply does not apply to Buchanan's case: a clarifying instruction was required in Cunningham because an inconsistency between the written instructions and the judge's oral instructions may have led the jury to believe it could not return a life sentence if it found an aggravating factor. 928 F.2d at 1012. No such case-specific need for further instruction existed in Buchanan's case.

The state court's decision, therefore, may not be reversed in this federal collateral proceeding. See 28 U.S.C. § 2254 (d); see also Caspari v. Bohlen, 510 U.S. 383, 390 (1993)("new rule" doctrine prohibits rulings on collateral review which were not "compelled" by precedent existing at time case became final on direct appeal).

II. BUCHANAN'S DUE PROCESS CHALLENGE TO THE SENTENCING INSTRUCTION STATES NO FEDERAL QUESTION.

Buchanan argues under Hicks v. Oklahoma, 447 U.S. 343 (1980), that he was denied due process because Virginia law allegedly vested him with a right to instruct the jury that certain statutorily-identified mitigating factors existed in his case.[5] Buchanan's claim properly (and easily) was resolved by the Fourth Circuit:

> ...there was no such violation in Buchanan's case because, contrary to his assertion, the trial court's instruction was consistent with the sentencing statute. The statute establishes a capital defendant's right to present mitigating evidence during the sentencing hearing. It neither imposes nor implies an obligation to instruct the jury about specific mitigating factors. Va. Code Ann. § 19.2-264.4
>
> Our reading of the statute is consistent with the Virginia Supreme Court's interpretation. It is clear from that court's decisions that the statute does not require the trial court to list specific mitigating circumstances. See, e.g., LeVasseur v. Commonwealth, 225 Va. 564, 594-595, 304 S.E.2d 644, 661 (1983). Because the jury instructions in this case were consistent with the sentencing statute,

---

[5] Buchanan says that the Fourth Circuit erred in relying on the Virginia Supreme Court's interpretation of Virginia's statutes and that it should have found he was entitled to the instructions because the "Legislature" had determined what mitigating factors should be considered by the jury. Obviously, however, the Virginia Supreme Court is the final arbiter of what Virginia law requires, see Estelle v. McGuire, 502 U.S. 62, 68 (1991), and, thus, the Fourth Circuit's reliance on the state supreme court's interpretation cannot constitute error.

Buchanan's due process argument must also fail.

Buchanan, 103 F.3d at 348 (see also Virginia cases cited above at p. 5).

Simply stated, the "Hicks" due process claim is based upon an examination of what process the State has determined is due. In the absence of a state requirement, there is no collorary federal right. Virginia Code § 19.2-264.4 sets forth various factors that a trial court "may" consider for "admission" into evidence. (Resp. App. 4). The statute does not require, however, the admission of particular evidence, much less jury instruction on the statutorily-identified factors. The Virginia Supreme Court, as final arbiter of state law, has determined that juries should not be given a list of mitigating factors lest they believe they may not consider non-statutory factors, and has decided, rather, that they should be directed to consider "all the evidence." See Buchanan, 238 Va. at 417, 384 S.E.2d at 773. Buchanan was not entitled to such an instruction under state law and, therefore, his "Hicks" claim presents no federal issue to review. To hold, as Buchanan urges, that due process required his jury to be instructed on specific mitigating factors even though state law did not require such an instruction, would violate the "new rule" doctrine as well as new § 2254 (d).

III. BUCHANAN'S HEARSAY CLAIM STATES NO FEDERAL QUESTION.

Buchanan argues that under Green v. Georgia, 442 U.S. 95 (1979), the exclusion of hearsay testimony from Dr. Brown, his sentencing-phase mental health expert, denied him due process. As the Fourth Circuit correctly concluded, however, the trial court's ruling "did not rise to the level of a constitutional violation." Buchanan, 103 F.3d at 349.

During the sentencing phase of Buchanan's trial, Dr. Brown testified extensively about

Buchanan's childhood treatment by his father and step-mother and opined that Buchanan had been under extreme emotional distress at the time of the offenses. Id. at 348. When Buchanan attempted to elicit testimony from Dr. Brown concerning what several persons had told him during interviews he conducted in preparation for the trial, the prosecutor objected on the grounds of hearsay. Id. ***The trial judge then offered several times to continue the trial and arrange to bring in the declarants to testify***. Id. at 349. Buchanan's counsel responded to this solution as follows:

> I don't want to do that, Judge. We have enough. I just want to object to your not allowing [the hearsay] in.

Id.[6] The judge then sustained the hearsay objection.

In Green v. Georgia, this Court vacated Green's death sentence on direct review because Georgia's rule that did not allow a hearsay exception for declarations against penal interest prevented the jury from hearing the declarant's ***confession to the murder***. Green, 442 U.S. at 97. That hearsay exception for declarations against penal interest -- an exception which long has been recognized in Virginia, see Hines v. Commonwealth, 136 Va. 728, 744, 117 S.E. 834, 847 (1923) -- does not apply to Buchanan's case. There was no exclusion of another's confession in Buchanan's case. And the inherent reliability of the spontaneous statements excluded in Green, 442 U.S. at 97, did not attach even remotely to the excluded witness ***interviews*** which were excluded in Buchanan's case. In short, as the Fourth Circuit correctly

---

[6] Counsel's representation that "We have enough" was an understatement. Dr. Brown's direct and redirect testimony alone spanned almost 50 pages of transcript. (CA4 App. 143-176, 213-227). His testimony covered the extensive interviews he had conducted with Buchanan and other doctors as well as his analysis of treatises, school records and a battery of psychological and neurological tests he had conducted.

observed, "[a]t Buchanan's trial, these compelling circumstances do not appear." Buchanan, 103 F.3d at 349.

This Court has made clear that the Constitution does not establish a "federal code of evidence to supersede state evidentiary rules," see Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004, 2011 (1994), and that such matters generally are not the province of federal collateral review. See Estelle v. McGuire, 502 U.S. at 68. The Virginia Supreme Court's rejection of Buchanan's claim, see Buchanan, 238 Va. at 416, 384 S.E.2d at 773, was reasonable. It therefore may not be reversed. See 28 U.S.C. § 2254 (d); Caspari, 510 U.S. at 390.

CONCLUSION

Buchanan concedes that he is guilty of the capital murder of his entire family. (Pet. at 4). His sentencing proceeding was conducted pursuant to state procedures which consistently have been upheld as constitutionally valid. There is no compelling reason or substantial ground upon which this Court should stay his execution or grant review of his case. The petition for a writ of certiorari and application for a stay should be denied.

Respectfully submitted,

RONALD J. ANGELONE, DIRECTOR, et al.,
Respondents herein.

By: _____
Counsel

JAMES S. GILMORE, III
Attorney General of Virginia

KATHERINE P. BALDWIN
Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

RESPONDENTS' APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF AMHERST

COMMONWEALTH OF VIRGINIA

V.

DOUGLAS MCARTHUR BUCHANAN, JR.

Filed in Circuit Court
Amherst County, Virginia
JAN 17 1989
Roy C. Lloyd, III
Clerk

Transcript of Proceedings

April 30, 1988

Amherst, Virginia

Volume VI

Pages 1527 - 1668

* * * *

THE HONORABLE ROBERT C. GOAD, PRESIDING

obviously guilty of this offense. He's guilty. We didn't put on any evidence. We're not going to insult you by putting on evidence that's saying Douglas McArthur Buchanan, [illegible] was not guilty. I mean it was overwhelming. And we are going to insult this jury by saying that he wasn't guilty.

There was a question--we had a question, so we presented it to you--whether it was first degree murder, second degree murder--I mean first degree murders or capital murder. And you came to the conclusion that it was first degree murder and one capital murder. We didn't--we pled not guilty for that reason. We didn't plead not guilty because he's not--wasn't guilty of killing the four people.

Now, there is something in the law that's called mitigation. Now mitigation--that doesn't mean that he is--that doesn't mean that he's making an excuse. Mitigation is not excuse. There's no excuse for what he did. But there--the law in its wisdom has given a jury and the court--if it's in the breast of the court--a way to weigh all the facets of a man's background, and the facets of any

pressure that he happened to be under at the time that the act that he's charged with occurred. And if they think, in their wisdom, that there is some factor that has redeeming value or there is some factor that means that he has some, not excuse--but some reason not to get the death penalty, then you have a right to take that into consideration and give him life in prison.

Now, the court--the jury--I keep saying the court, but the court and the jury can consider almost anything. There are certain facts that are set down in the statute, but practically any factor can be considered in mitigation.

Now, one of the factors, for example, is youth. That's set in the code. Youth is one of the factors that you can take in consideration. It doesn't say emotional age. Although Dr. Brown says that his emotional age is ten years of age. But his actual chronological age was nineteen at the time that he did this. That's youth. And you can take his youth in consideration.

Now, it doesn't say that you take his

§ 19.2-264.4. Sentence proceeding. — A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be l[illegible]d to, the following: (i) The defendant has no significant history of prior crim[illegible] activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense or (vi) mental retardation of the defendant.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed ....., foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed ....., foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life. (1977, c. 492; 1980, c. 160; 1990, cc. 316, 754.)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, was caused to be hand delivered to Katherine P. Baldwin, Esq., Assistant Attorney General, 900 East Main Street, Sixth Floor, Richmond, VA 23219 on this 27th day of March, 1997.

Gerald Zerkin